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Nos. 14-556, 14-562, 14-571 & 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,
Petitioners,

—v—

RICHARD HODGES, Director,
Ohio Department of Health, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE CITIZENS UNITED FOR THE INDIVIDUAL FREEDOM TO DEFINE MARRIAGE IN SUPPORT OF NEITHER PARTY AND AFFIRMANCE

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTEREST OF THE AMICUS CURIAE

WHO

Citizens United[1] for the Individual Freedom to Define Marriage ("Citizens United") is a collection of citizens who believe that defining marriage should not be left to the government. Rather, Citizens United believes the U.S. Constitution affords each citizen the right and liberty to define marriage according to their personal values and beliefs.

WHAT

The issue before the Court–defining marriage–pits the interests of two societal groups against each other. The lesbian, gay, bisexual and transgender ("LGBT") community and their typically liberal supporters believe in providing same-sex couples the legal rights and benefits of marriage. The people opposing same-sex marriage are typically conservative, many of whom oppose same-sex marriage based upon their religious beliefs. It is safe to say that no love lost exists between many individuals within these two groups, and the attendant animosity creates an atmosphere harmful to the nation.

Both societal groups desire the Supreme Court to embrace their cause and declare them the winner.

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[1] Undersigned counsel for the Citizens United has authored this amicus brief in whole, and no other person or entity has funded its preparation or submission. All parties have consented to the filing of this brief with any required correspondence on file with the clerk.

But this is not the Super Bowl where one team must emerge victorious. Rather, this is a complex societal issue, and Citizens United comes before the Court to offer a solution that addresses the concerns of both groups.

How

The solution is simple: the government cannot employ the words "marriage" or "marry" in any manner that could be construed as the government either supporting or opposing same-sex marriage. To achieve the legitimate government interest in regulating the unions of all couples, including same-sex couples, the government should employ such terms as "civil union" and "united."

Thus, the government should only issue civil union licenses as opposed to marriage licenses. The government issuing civil union licenses to all couples provides the legal rights and benefits to same-sex couples that the LGBT community and their supporters desire.

Why

The words "marriage" and "marry" occur within the Bible, such as in Mark 12:25 (New International Version), and little wonder many citizens become annoyed when their government defines these words in violation of their faith. However, while many churches oppose same-sex marriage, one can find many churches that support same-sex marriage.

This is a point that has seemingly gone unnoticed in this battle royale–the implicit role of the Establishment Clause. Under the Establishment

Clause, the government cannot favor one religious doctrine over another, yet that is the danger lurking here–the Supreme Court providing its authoritative opinion that one religious view is more favored or appropriate than that of another religion.

Defining "marriage" should be left to *The People* and the various faiths they represent, including atheism. Under this legal construct involving the Establishment Clause, a same-sex couple wishing to be married can find any number of churches supporting same-sex marriage to perform a marriage ceremony for them. Alternatively, an opposite-sex couple who abhors organized religion can obtain a civil union license and forgo any religious marriage ceremony.

The Court is now poised to declare a winner. Citizens United believes the U.S. Constitution affords each citizen the individual freedom to define marriage according to their personal values and beliefs. And in a country where the government refrains from imposing any one belief system upon its citizens, *The People* emerge victorious.

SUMMARY OF THE ARGUMENT

The Establishment Clause of the U.S. Constitution figuratively provides "a wall of separation between church and State." *Everson v. Bd of Educ.*, 330 U.S. 1, 16 (1947). More recently, the courts have used the *Lemon* tripartite test to assess whether a government action runs afoul of the Establishment

Clause. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

In this case, the effect prong of *Lemon* is relevant to investigate the effect of the message conveyed when the government defines a term occurring in the Bible. The government violates the Establishment Clause when it defines marriage because the effect of the message that accompanies the ensuing law is that a particular religious belief is disfavored.

The entanglement prong of *Lemon* is relevant as well. The government violates the Establishment Clause when it defines marriage because the character of this government activity involves the disparagement of some religious views, and the resulting divisiveness is proportional to that associated with school prayer. Additionally, the government defining marriage leads to political division along religious lines.

A fundamental tenet of the Establishment Clause, which is addressed in *Everson*, is that the government may not favor one religion over another. The government violates the Establishment Clause when it defines marriage because some churches favor same-sex marriage, while other churches do not, and a law respecting same-sex marriage demonstrates a preference for one religion over another.

The same-sex couples appearing before the Court claim to have a fundamental right to marriage, but in view of the Establishment Clause, the only fundamental right that exists for any couple is the right that enables all couples to enter into a

state-sponsored civil union. To satisfy a desire to become married, any couple possesses the religious freedom to select a church that will perform a marriage ceremony for them.

ARGUMENT

I. THE GOVERNMENT DEFINING MARRIAGE IMPLICATES THE ESTABLISHMENT CLAUSE.

A. The Fourteenth Amendment Requires the Court to Apply the Establishment Clause.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. "The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (citing *Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985)).

While the Court determines whether the Fourteenth Amendment requires a state to license a "marriage" between two people of the same sex, the Court must also consider the restriction the Establishment Clause places on a state to license a union of two people through the use of the word "marriage," a word that occurs in the Bible and has religious implications.

B. The Tripartite Test of *Lemon* Must Be Applied to Determine the Government's Compliance with the Establishment Clause.

Courts evaluate potential violations of the Establishment Clause through the *Lemon* tripartite test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). If a state action violates any one of the three prongs of the *Lemon* test, the state action violates the Establishment Clause and is unconstitutional.

1. The Effect Prong of *Lemon* Prevents the Government from Disapproving of Religion or Particular Religious Beliefs.

In evaluating a state action under the effect prong of *Lemon*, the court "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). The government impermissibly endorses religion if its conduct has the effect of conveying "a message that religion or a particular religious belief is *favored or preferred*." *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (quoting *Wallace*, 472 U.S. at 70) (emphasis retained). Alternatively, the government disapproves of religion if its conduct has the effect of conveying "a

message that religion or a particular religious belief is [not] favored or [not] preferred." *Id.*

2. The Entanglement Prong of *Lemon* Prevents the Government from Engaging in Activity that Creates Divisiveness

The *Lemon* Court recognized "[a] broader base of entanglement of yet a different character [that] is presented by [a] divisive political potential." *Lemon*, 403 U.S. at 622. "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.* (citing Freund, *Comment, Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)). Political divisiveness within the *Lemon* test, however, "should be 'regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.'" *Bowen v. Kendrick*, 487 U.S. 589, 617 n.14 (1988) (quoting *Mueller v. Allen*, 463 U.S. 388, 404 n.11 (1983)).

Divisiveness under the entanglement prong, however, need not necessarily be political in nature. In striking down a school-sanctioned prayer at a high school graduation ceremony, the Court noted the relevance of the "potential for divisiveness." *See Lee v. Weisman*, 505 U.S. 577, 587-88 (1992). Similarly, in striking down school prayer in public schools, the Court recognized divisiveness again: "[t]he philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in

the field of religion better serves all religious interests." *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).

C. Respect for the Establishment Clause by the Government Prevents the Degradation of Religion

The tripartite test of *Lemon* is consistent with the principles stated in the landmark case of *Everson*. "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson*, 330 U.S. at 15. The legal framework of the Establishment Clause "ensure[s] that the organs of government remain strictly separate and apart from religious affairs, for 'a union of government and religion tends to destroy government and degrade religion.'" *Lynch*, 465 U.S. at 698 (quoting *Engel*, 370 U.S. at 431) (Brennan, J., dissenting).

II. THE WORDS "MARRIAGE" AND "MARRY" ARE USED IN THE BIBLE AND THUS ARGUABLY SACRED TO PEOPLE OF FAITH.

The books of the Bible were originally authored in Hebrew and Greek, and English speakers required a translation to make the Bible accessible to them. *See Foreword* to The Bible (New American Standard) (Collins Publishers Reference ed.) (1975). The following English translations of the Bible contain or directly reference the words "marriage" or "marry":

> So I counsel younger widows to marry, to have children, to manage their homes and

> to give the enemy no opportunity for slander.

1 Timothy 5:14 (New International Version).

> Jesus replied, "The people of this age marry and are given in marriage. But those who are considered worthy of taking part in the age to come and in the resurrection from the dead will neither marry nor be given in marriage. . . ."

Luke 20:34-35 (New International Version).

> Do not intermarry with them. Do not give your daughters to their sons or take their daughters for your sons. . . .

Deuteronomy 7:3 (New International Version).

> "I tell you that anyone who divorces his wife, except for sexual immorality, and marries another woman commits adultery." The disciples said to him, "If this is the situation between a husband and wife, it is better not to marry."

Matthew 19:9-10 (New International Version).

> Jesus replied, "Are you not in error because you do not know the Scriptures or the power of God? When the dead rise, they will neither marry nor be given in marriage; they will be like the angels in heaven."

Mark 12:24-25 (New International Version).

Although several of these passages imply that marriage is between a man and a woman, that is not the point. Rather, the passages establish that "mar-

riage" and "marry" occur within the Bible, and any government attempt to define marriage based upon gender implicates religious beliefs and biblical interpretations.

III. Marriage Naturally Emerged in the Nation as a Single Religious and Governmental Institution.

The Founding Fathers did not necessarily find the presence of religion within the government particularly troubling. In his Farewell Address, George Washington writes, "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports." Given this initial attitude towards religion in political affairs by an esteemed Founding Father, the harmonious emergence of marriage as a indistinguishable religious and governmental institution is not surprising–no reason seemingly existed to separate the two.

But the emergence of gay rights in contemporary society marks the end of the harmonious existence of marriage within the fabric of religion and government. Religion and government are no longer compatible to accommodate the regulation of unions with the word "marriage."

IV. THE GOVERNMENT DEFINING MARRIAGE VIOLATES THE ESTABLISHMENT CLAUSE.

A. The Government's Involvement in the Same-Sex Marriage Dispute Fails the Effect Prong of *Lemon*.

1. The Government Defining Marriage Has the Effect of Disapproving of a Particular Religious Belief.

Despite the long-running dispute over same-sex marriage, the applicability of the Establishment Clause and *Lemon* seems to have gone largely undetected by the legal community. Perhaps this is a consequence of the effect prong frequently involving the government endorsing religion as opposed to it disapproving of religion. It is easy to detect government activities that have the effect of communicating a message that endorses religion, such as displaying large crosses along roadsides in Utah to honor fallen police officers. *See Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1150 (10th Cir. 2010) (holding that such a practice violates the Establishment Clause). A government action that communicates a message that disapproves of religion may be harder to detect because this message is partially consistent with the general principle that the church and state remain separate.

Disapproval under the effect prong of *Lemon* exists if the government conduct has the effect of conveying a message that a particular religious belief is not preferred or not favored. *See County of Allegheny*, 492 U.S. at 592-94. When the government begins to define marriage, religious beliefs become

relevant due to the occurrence of the words "marriage" and "marry" in the Bible. Thus, any position by the government that supports same-sex marriage has the effect of conveying to the public–and especially to those members whose faith does not support same-sex marriage–that a particular religious belief to the contrary is not preferred and not favored.

2. *Windsor* Has the Effect of Conveying a Message of Disapproval of a Particular Religious Belief.

In *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act (DOMA) is unconstitutional, Justice Scalia makes the following observations about the majority opinion:

> But the majority says that the supporters of this Act acted with *malice*–with *the "purpose"* (*ante*, at 2695) "to disparage and to injure" same-sex couples. It says that the motivation for DOMA was to "demean," *ibid.*; to "impose inequality," *ante*, at 2694; to "impose . . . a stigma," *ante*, at 2692; to deny people "equal dignity," *ibid.*; to brand gay people as "unworthy," *ante*, at 2694; and to "*humiliate[e]*" their children, *ibid.*

Id. at 2708 (Scalia, J., dissenting).

The majority directs the above comments to those who support DOMA, but these comments are easily extended to many people of faith who supported DOMA because it was consistent with their beliefs. Undoubtedly the Court in *Windsor* did

not intend to convey a message of disapproval to these people of faith, as the intent of the Court was to deliver an opinion concerning DOMA.

But Justice O'Connor stated that the intent in conveying a message of disapproval is irrelevant:

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Lynch, 465 U.S. at 692 (O'Connor, J., concurring).

The government's message of endorsement or disapproval might need to be inferred, such as in the case of interpreting the effect of the setting in a crèche display. *See County of Allegheny*, 492 U.S. at 598. In contrast, the Court's message in *Windsor* is direct, and the public can easily perceive that the majority disapproves of people of faith who do not support same-sex marriage. In essence, the majority opinion in *Windsor* has the effect–although not necessarily the intent–to make these people of faith feel like "outsiders." *See id.* at 688 (stating "[disapproval] sends a message to [adherents] that they are outsiders, not full members of the political community") (O'Connor, J., concurring).

The path taken by the Court in *Windsor* represents the danger of the government defining marriage in contradiction of the Bible. People who do not share the same religious views as the

government on same-sex marriage will be subject to the same type of criticism contained in *Windsor*, and secularists who attack these people of faith will have the implied support of the government.

B. The Government's Involvement in Defining Marriage Fails the Entanglement Prong Because the Activity Creates Divisiveness.

Political divisiveness along religious lines is evidence of excessive government entanglement with religion. *Lemon*, 403 U.S. at 622. However, holding a practice unconstitutional based only upon political divisiveness "is simply too speculative an enterprise. . . . [Rather,] the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself." *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

The character of the government's efforts to define "marriage" based upon gender is this: some people of faith feel violated when the government uses a term from the Bible to enact laws that contradict their religious beliefs. The deep divisiveness associated with the issue of same-sex marriage is a consequence of the government entangling itself with a biblical term that it should not be using to regulate the unions of all couples.

The people who oppose same-sex marriage and the people who support same-sex marriage, including those people of faith who believe the Bible supports same-sex marriage, are likely to align themselves with either conservative Republicans or liberal Democrats, respectively. And although it may be

"simply too speculative" to conclude that political division exists along religious lines here, *see Lemon*, 403 U.S. at 622, one might be hard pressed to argue otherwise given the degree to which the nation is politically polarized.

The deep divisiveness created by the issue of same-sex marriage is certainly proportional to the divisiveness that accompanies school prayer. *See Lee*, 505 U.S. at 517; *Engel*, 370 U.S. at 443. When the government attempts to force a particular religious belief or practice upon the general population, the resulting divisiveness is not surprising and nearly a certainty.

C. Government Efforts to Define Marriage Will Favor Some Religions and Disfavor Others.

Before the emergence of the *Lemon* tripartite test, *Everson* recognized a fundamental tenet of the Establishment Clause, which is "[n]either [a state nor the federal government] can pass laws which . . . prefer one religion over another." *Everson*, 330 U.S. at 15. Given this tenet, the government will run afoul of the Establishment Clause whenever it attempts to define the union of a couple with the biblical term "marriage."

Even if a state or federal government maintains the traditional definition of marriage between a man and a woman, the government will still violate the Establishment Clause because this definition will come at the expense of churches that now support same-sex marriage. Times change and with the emergence of same-sex unions as a societal, religious,

and legal issue, the government's application of the term "marriage" to any couple is now unconstitutional.

V. The Tension Between the Establishment Clause and the Petitioners' Equal Protection and Due Process Claims Can Be Reconciled.

A. The Government Must Remain Neutral on Defining Marriage to Prevent the Destruction of Government and Degradation of Religion.

"[A] union of government and religion tends to destroy government and degrade religion." *Lynch*, 465 U.S. at 698 (quoting *Engel*, 370 U.S. at 431) (Brennan, J., dissenting). The issue of same-sex marriage now before the Court has fulfilled this expectation.

The issue of same-sex marriage has degraded religion, both in terms of secularists who attack people of faith and people who characterize themselves as Christian yet vehemently chastise homosexuals. The disputatious individuals who exhibit vile hatred towards homosexuals ultimately betray the Christian faith and the word of Jesus Christ–"A new command I give you: Love one another. As I have loved you, so you must love one another. By this everyone will know that you are my disciples, if you love one another." John 13:34-35 (New International Version).

The issue of same-sex marriage has been destructive to the nation's form of self-governance. The Constitution should readily afford equal rights to

all its citizens, regardless of sexual orientation. But when a gay rights issue incorporates an element of religion, the battle lines readily appear for a battle royale in which, as Justice Brennan posited, much is lost through the destruction of government and degradation of religion. *See Lynch*, 465 U.S. at 698 (Brennan, J., dissenting).

Marriage, based upon its biblical roots, is a religious institution. In view of the Establishment Clause, the government can no more decide the legitimacy of same-sex marriage than it can determine the ultimate issue between the Jewish and Christian faiths–the resurrection of Jesus Christ. While many people are desirous of the government to declare a victorious party on the issue of same-sex marriage, the Constitution forbids it to do so and the government must remain neutral. *See Engel*, 370 U.S. at 443 (stating "a government neutral in the field of religion better serves all religious interests") (Douglas, J., concurring)).

B. State Governments Have Already Used the Term "Civil Union" to Regulate Both Same-Sex and Opposite-Sex Couples.

Civil unions arose in Vermont after the Vermont Supreme Court held in 1999 that same-sex couples were not entitled to a marriage license, but they were entitled to the same "benefits and protections" that the law affords married opposite-sex couples. *See Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). In response to the Vermont Supreme Court directive to create a statutory scheme that provides same-sex couples with the benefits and protections of an opposite-sex marriage, the Vermont Legislature

employed the term "civil union" in the resulting statutes. *See* Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2014) (noting the term "civil union" remains in the statutes despite subsequent amendments). The statutory scheme requires that a civil union must be between two people of the same sex. *See Id.* § 1202.

In 2013 Colorado similarly created a statutory scheme to extend the benefits and protections of marriage laws to same-sex couples. *See* Colo. Rev. Stat. §§ 14-15-101 to -119 (2014) (enacting the Colorado Civil Union Act). In contrast to the Vermont statutory scheme, civil unions are also available to opposite-sex couples as well. *See id.* § 14-15-104(1)(a). Additionally, "[a] priest, minister, rabbi, or other official of a religious institution or denomination or an Indian nation or tribe is not required to certify a civil union in violation of his or her right to the free exercise of religion guaranteed by the first amendment to the United States constitution." *Id.* § 14-15-112(4).

C. All Couples Only Possess the Right to a Civil Union Under the Equal Protection and Due Process Clauses.

The issue of same-sex marriage entails equality–same-sex couples desire their government to recognize them as equals to opposite-sex couples. The Establishment Clause prevents this equality to be gained by the government defining marriage to include same-sex couples. Consequently, equality can only be achieved before the government and under the Equal Protection and Due Process Clauses by limiting all couples to civil unions. Thus, for example,

the government can only issue civil union licenses and never marriage licenses.

Using the same legal rationale of any court that holds a same-sex couple has a fundamental right to marriage, *see, e.g., Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014), all couples possess a fundamental right to be united under state laws and have the government provide legal rights and benefits to them. A couple may extend their civil union to marriage through a marriage ceremony at a church, but conducting and participating in a marriage ceremony involves religious decisions left to that particular couple and their church.

VI. The Freedom to Define Marriage Resides with *The People*.

"Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea." *DeBoer v. Snyder*, Nos. 14-1341/ 3057/ 3464/ 5291/ 5297/ 5818, slip op. at 8 (6th Cir. Nov. 6, 2014). The Sixth Circuit's instinct for resolving this issue is correct–judges, and for that matter politicians–within the government should not decide this issue. *The People* should have the individual liberty to define marriage according to their own beliefs and values, whether religious or otherwise.

The majority opinion in DeBoer concluded by stating:

> When the courts do not let *the people* resolve new social issues like this one, they perpetuate the idea that the heroes in these

> change events are judges and lawyers. Better in this instance, we think, to allow change through the customary *political processes*, in which *the people*, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.

Id. at 42 (emphasis added).

Kudos to the Sixth Circuit for recognizing the value of *The People* to resolve the issue. But it is not the contemporary "political processes" that will finally resolve this issue. No, it is the wisdom of the Founding Fathers residing in the Establishment Clause that ultimately provides the necessary guidance to yield a reasonable solution to a seemingly insurmountable problem.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully Submitted,

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